



## GOVERNMENT'S TRIAL BRIEF

Nov. 12, 1997

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### C. Foundational Questions Regarding Admissibility May Be Resolved Outside the Presence of the Jury Pursuant to FRE 104

As the government indicated in its Trial Confirmation Hearing Statement, due to the large volume of evidence taken from the crime scenes and from the cabin, it will take a substantial amount of Court time in the jury's presence just to identify each specific item of evidence for the record, before the authentication testimony is adduced. This will also be the most tedious testimony that the jury will hear. In order to expedite the process and to spare the jury from listening to the identification testimony, the government proposes that identification of the evidence from the cabin and from the larger bombing crime scenes take place at a hearing outside the jury's presence, at a time when it would not otherwise be sitting. As we explain below, such a procedure is consistent with the Federal Rules of Criminal Procedure, as well as the Federal Rules of Evidence, which provide that: "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court...." FRE 104 (a).

#### 1. Questions Regarding Authentication Are Governed By Evidence Rules 901(a) and 104(b)

Authentication of evidence involves a preliminary question in which the court must determine whether the jury could conclude the evidence is authentic. See FRE 104(b), 901(a). Rule 901(a) provides that the "requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence or other showing sufficient to support a finding that the matter in question is what its proponent claims."

This requirement of authentication or identification is the paradigm of a preliminary question under Rule 104 (b) . The judge is first required to determine whether a reasonable jury could conclude that evidence was authentic, then the ultimate question of authenticity is for the jury. However, it is the rare trial lawyer who requests that the question of authenticity be included in the jury charge.

1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 104.30[3] at 104-68 (Joseph M. McLaughlin ed., 2d ed. 1997). See Ricketts v. City of Hartford, 74 F.3d 1397, 1409-10 (2d Cir. 1996) (holding trial judge makes preliminary determination as to authenticity of evidence under Rule 104(b)); United States v. Paulino, 13 F.3d 20, 23 (1st Cir. 1994), citing FRE 104(b), ("In respect to matters of authentication, the trial court serves a gatekeeping function. If the court discerns enough support in the record to warrant a reasonable person in determining that the evidence is what it purports to be, then Rule 901(a) is satisfied and the weight to be given to the evidence is left to the jury"); United States v. Shaw, 920 F.2d 1225, 1230 (5th Cir. 1991) (Once trial court makes preliminary determination that a jury could reasonably conclude that the disputed authenticity of physical evidence has been established court may admit the evidence).

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## 2. A Pretrial Hearing Is a Proper Method of Resolving the Preliminary Question of Admissibility

Rule 17.1 of the Federal Rules of Criminal Procedure pertains to pretrial conferences. It states that "the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial." Fed.R.Crim.P. 17.1. "The rule is cast in broad language so as to accommodate all types of pretrial conferences." Id., Advisory Committee Notes.

Questions as to the authenticity of evidence for purposes of admissibility may be resolved via pretrial conference. See United States v. Pelullo, 961 F.Supp. 736, 742 (D. N.J. 1997) (Debevoise, J.) (extended in limine evidentiary hearing pursuant to Rule 104 held at government's request to determine authenticity of evidence; various custodians identified documents and testified about manner in which they were maintained); Kam Fui Trust v. Brandhorst, 884 P.2d 383, 389 n.2 (Haw. Ct. App. 1994) quoting M GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6821 at 851 (Interim Ed. 1992) ("[P]retrial disposition of authentication issues . . . may be accomplished through a pleading, by a request to admit, ... or as a result of an agreement reached at the pretrial conference"); United States v. Smith, 65 F.R.D. 464 (N.D. Ga. 1974) (government's request for pretrial conference granted, with directions to counsel for both parties to explore possibilities for stipulating to authenticity and admissibility of documents) . Indeed, a pretrial conference may be preferable. See United States v. Branch, 970 F.2d 1368, 1371 (4th Cir. 1992) (holding in camera hearing addressing authenticity appropriate because it insures that jury will not be tainted by hearing prejudicial evidence until proponent demonstrates an adequate

foundation for admission).

### 3. A Pretrial Hearing Is Appropriate in this Case

With regard to admissibility of evidence, Rule 104 excuses "time-consuming compliance with a superfluous formality." United States v. De La Fuente, 548 F.2d 528, 533 (5th Cir. 1977) (en banc), cert. denied sub nom., Stewart v. United States, 431 U.S. 932. See United States v. Brewer, 947 F.2d 404, 410 (9th Cir. 1991) (quoting De La Fuente) . A jury can be adequately apprised of authenticating proof, and thus properly determine the weight of the evidence without being subject to the exact same authenticating proof considered by the judge in making a preliminary determination of admissibility under Rule 104 (b)

Removing factual issues related to determining whether evidence is competent from the jury is based on recognition that the typical juror is intent mainly on reaching a verdict- in accord with what he believes to be true in the case he is called upon to decide, and is not concerned with the long term policies of evidence law.

Ricketts, 74 F.3d at 1409-10.

In this case, addressing evidence identification at a pretrial hearing would not compromise the jury's ability to weigh the evidence. At trial, the seizing agent could testify, in the presence of the jury, that an entire box (or several boxes) of evidence came from a particular location without specifically identifying each item. (*13. The government would reserve the right to have certain specific items identified before the jury.*) In authorizing this procedure, the Court could thus spare the jury from identification testimony as to each and every bomb fragment, bomb component, et cetera, and still enable the jury to adequately determine the weight of the government's evidence. In light of this alternative, such painstaking detail in the presence of the jury is indeed "time-consuming compliance with a superfluous formality," and is therefore unnecessary under Rule 104. See De La Fuente, 548 F.2d at 533.

For the reasons stated above, the government respectfully requests this court to grant the government's motion for a pretrial hearing for evidence identification pursuant to Rule 104.

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